

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4199
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: September 24, 1997
TO: Council Member Juan Vargas
FROM: City Attorney
SUBJECT: Eligibility to Run for District 8 Council Seat in 1998

QUESTION PRESENTED

You have asked whether you are eligible to run for the District 8 Council seat at the District Primary in 1998 or whether you are precluded from running for that seat because of the term limitations set forth in San Diego Charter section 12 (f).

SHORT ANSWER

You may run for the District 8 Council seat in 1998. The term limitation provision of the Charter precludes someone from running for re-election if they have served more than two full terms, as defined. That restriction is not yet applicable to you because you have served only one full term, as defined in the term limitation provision.

BACKGROUND

We first point out that this question appears uniquely applicable to you, as you are the only person to whom the circumstances can possibly apply because of the timing of the various changes to the Charter set forth below. You have provided us the following information.

Bob Filner was sworn in as the District 8 Council representative in December of 1991 for a four year term expiring in December of 1995. Mr. Filner subsequently ran for, and was elected to, the House of Representatives in 1992, thus creating a vacancy in the District 8 Council seat. At that time, Charter section 12 provided as follows concerning a vacancy:

[I]n the event a vacancy occurs for any reason in the office of a Council District, the Council shall immediately cause an election to be held to fill such vacancy solely in the district in which the vacancy occurred . . . Any person who fills the vacancy shall hold office only until the next regular municipal election, at which time a person shall be elected under the provisions of Section 10 of this Charter to serve for the remainder, if any, of the unexpired term.

A copy of then-existing Charter section 12 is enclosed as Attachment 1.

Accordingly, on November 23, 1992, the City Council adopted Ordinance No. O-17875 which called for a special election in February of 1993 for the purpose of filling the vacancy in District 8. A copy of that ordinance is enclosed as Attachment 2. In particular, Section 3 of the ordinance stated:

The person elected at this Special Election to fill the vacancy shall hold office only until the next regular Municipal Election, at which time a person shall be elected under the provisions of Charter section 10 to serve for the remainder of the unexpired term, that is, until December 4, 1995.

You ran for the District 8 seat at that election, were elected, and were sworn in on February 22, 1993.

A municipal election (for odd-numbered District seats) was to be held in 1993. Pursuant to the vacancy provisions of Charter section 12, on June 14, 1993, the City Council adopted Ordinance No. 17932 which called for a special election, to be consolidated with the regular municipal primary election in September of 1993, for the purpose of nominating candidates for the District 8 office.¹ A copy of that ordinance is enclosed as Attachment 3. In particular, Section 1 of the ordinance provided:

It is hereby ordered that a Special Municipal Primary Election be held . . . for the purpose of nominating candidates for the following office:

COUNCILMEMBER for District No. 8 *two-year term*

(Emphasis added.)

¹Although the stated purpose of the election was to “nominate” candidates, pursuant to Charter section 10, a candidate could be elected to office at the primary if that candidate received more than fifty percent of the vote.

You ran for re-election to the District 8 office at that time, were re-elected, and were sworn in on December 6, 1993, to "serve for the remainder, . . . , of [Mr. Filner's] unexpired term."

In June of 1992, the electors of the City adopted an amendment to Charter section 12 (then unsubdivided but now Charter section 12(f)) that established term limits for Council members. That section provided:

Notwithstanding any other provision of this Charter and commencing with elections held in 1992, no person shall serve more than two consecutive four-year terms as a Council member from any particular district. If for any reason a person serves a partial term as Councilmember from a particular district in excess of two (2) years, that partial term shall be considered a full term for purposes of this term limit provision. Persons holding office prior to the November 1992 election shall not have prior or current terms be counted for the purpose of applying this term limit provision to future elections.

That version of Charter section 12 is the same as that enclosed as Attachment 1. Although Mr. Filner would have benefitted from the grandfather provision in the new Charter section, having last been elected in December of 1991, ostensibly you do not, having been first elected in February of 1993.

In November of 1992, the electorate adopted another amendment to Charter section 12 (then unsubdivided but now Charter section 12 (d)) which provided that the election for the even-numbered District seats occurring in 1995 would be for a term of only three years, which was similar to the election for the even-numbered seats in 1993.² You stood for re-election in 1995, and were re-elected to the District 8 seat for the three year term, expiring in December of 1998. A copy of then-existing Charter section 12 is enclosed as Attachment 4.

In sum, you have been elected to office three times, for the following periods: 1) from February 22, 1993, until December 6, 1993; 2) from December 6, 1993, until December 4, 1995; and, 3) from December 4, 1995, until December 8, 1998. There is no question but that the last period is a "full term" for purposes of the term limitation in Charter section 12(f). The issue pertinent to your inquiry is whether the periods described in (1) and (2) are separate "partial terms" for purposes of the term limitation or whether they count as a single "partial term." Stated another way, the issue is whether you served two separate "terms" upon your predecessor leaving office or whether you served out the single "term" of your predecessor, which "term" continued

²Previously, the Charter provided for Council District elections in odd-numbered years. The Charter was amended in 1992 to coordinate Council District elections with state and federal elections in even-numbered years.

from your election in February of 1993 until your election in December of 1995. If you served two partial terms upon your predecessor leaving office you are not precluded from running for the District 8 seat in 1998; if you served a single partial term, you are.

ANALYSIS

I

APPLICABLE RULES OF STATUTORY CONSTRUCTION

The answer to your inquiry depends upon the interpretation of Charter and Municipal Code provisions. We therefore start with an outline of applicable rules of statutory construction. A charter is the supreme law of a charter city. A charter is an instrument of limitation, however, and not a grant of power. Taylor v. Crane, 24 Cal. 3d 442, 450 (1979). A charter is construed in the same manner as a statute. Domar Electric, Inc. v. City of Los Angeles, 9 Cal. 4th 161, 171 (1994). The sole objective is to ascertain and effectuate the legislative intent. The language of the charter is looked to first, giving effect to its plain meaning. Where words of a charter are clear, they may not be added to or altered. Id. at 172.

The charter must be given a “reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.” DeYoung v. City of San Diego, 147 Cal. App. 3d 11, 18 (1983). “[M]atters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction” all must be taken into account. San Diego Union v. City Council, 146 Cal. App. 3d 947, 954 (1983), quoting Cossack v. City of Los Angeles, 11 Cal. 3d 726, 733 (1974). Where there are several provisions, the statute should be interpreted in such a fashion as to give effect to all. Cal. Code Civ. Proc. § 1858. The charter must be construed so as to harmonize rather than raise conflicts. Woodward v. Southern Cal. Permanente Medical Group, 171 Cal. App. 3d 656, 664 (1985); DeYoung, 147 Cal. App. 3d at 18.

The contemporaneous construction or interpretation of the law by those charged with its implementation is indicative of the law’s meaning and entitled to great weight. Id. at 18. Where there has been a change in the law, the prior state must be considered when interpreting the charter section at issue. People v. Horn, 158 Cal. App. 3d 1014, 1031 (1984). The electorate is presumed to “be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended [charter provisions] ‘in the light of such decisions as have a direct bearing upon them.’” People v. Overstreet, 42 Cal. 3d 891, 897 (1986) (citations omitted).

These provisions are equally applicable to the interpretation of San Diego's Municipal Code, with the proviso that Charter provisions control over conflicting Municipal Code provisions, as the Charter is the supreme law of San Diego. The Charter and Municipal Code should be construed to harmonize and avoid conflict where possible, however.

II

THE PERIODS FEBRUARY 23, 1993, THROUGH DECEMBER 6, 1993, AND DECEMBER 6, 1993, THROUGH DECEMBER 4, 1995, ARE SEPARATE "PARTIAL TERMS" FOR PURPOSES OF THE TERM LIMITATIONS PROVISIONS OF THE CHARTER

A. History Of Charter Section 12.

Numerous changes have been made to Charter section 12 over the years, some relevant to your inquiry. In 1989, Charter section 12 provided with regard to vacancies:

Any vacancy occurring in the Council shall be filled from the District in which the vacancy occurs by appointment by the remaining Council members; but in the event that said remaining Council members fail to fill such vacancy by appointment within thirty (30) days after the vacancy occurs, they must immediately cause an election to be held to fill such vacancy; provided, however, that *any person appointed to fill such vacancy shall hold office only until the next regular municipal election, at which date a person shall be elected to serve for the remainder of such unexpired term.*³ [Emphasis added.]

A vacancy was thus filled first by appointment or, if no timely appointment was made, by a special election. The Charter also provided that a person appointed or elected to fill a vacancy would hold office until the next regular municipal election at which time a person would be elected to finish out the unexpired term of the office. This election was still a special election consolidated with the general municipal election. See Charter § 12 (h) (1) (B).

In 1991, that provision was revised to provide that, if an election was held to fill a vacancy, it was to be held solely in the District in which the vacancy occurred:

[I]f the Council fails to fill such vacancy by appointment within thirty (30) days after the vacancy occurs, the Council shall immediately cause an election to be held to fill such vacancy solely in the district in which the vacancy occurred Any

³Although not specifically denominated as such, the election called to fill a vacancy is a special election. Municipal Code §§ 27.2003 (k), 27.2402.

person who fills the vacancy, whether by appointment or election in the District, shall hold office only until the next regular municipal election, at which time a person shall be elected under the provisions of Section 10 of this Charter to serve for the remainder, if any, of the unexpired term.

The next revision, effective in July of 1992, required an election to fill a vacancy unless the vacancy occurred within 100 days of a regular municipal election, in which case an appointment could be made. In all other relevant respects, the Charter provision remained the same:

[I]n the event a vacancy occurs . . . the Council shall immediately cause an election to be held to fill such vacancy solely in the district in which the vacancy occurred . . . If, however, a vacancy occurs for any reason in the office of a Council District within 100 days of an upcoming regular municipal election, the Council may in its discretion forego the election process and fill the vacancy by appointment. Any person who fills the vacancy shall hold office only until the next regular municipal election, at which time a person shall be elected under the provisions of Section 10 of this Charter to serve for the remainder, if any, of the unexpired term.

At this time the term limit provision of Charter section 12 was also added.

The next and final relevant Charter revision was effective in August of 1994. At that time, significant revisions to the form of Charter section 12 were adopted. Amongst other things, a distinction was made between a vacancy due to successful recall and due to any other reason. If the vacancy was due to resignation:

(A) If the vacancy occurs with one (1) year or less remaining in the term, the Council shall appoint a person to fill the vacant seat on the City Council . . . ; or,

(B) If the vacancy occurs with more than one (1) year remaining in the term, the Council shall call a special election, [or combine it with a regular municipal election if within 180 days].

. . . .

Whether a person is appointed or elected to fill a vacant Council District seat, whatever the reason for the vacancy, that person shall serve as that District's Councilmember for the remainder of the unexpired term.

One other provision of Charter section 12 is relevant to the inquiry. There is no specific definition of "term" or "partial term" in the Charter. However, Charter section 12 (e) provides: "Except as provided in this Section, Council members shall hold office for the term of four (4) years from and after 10 a.m. the first Monday after the first day of December next succeeding

their election *and until their successors are elected and qualified.*” (Emphasis added.) This Charter provision has been substantively the same since at least February of 1991.

B. Prior To The Charter Amendments Of 1994, A Separate “Caretaker” Term Came Into Existence Upon The Creation Of A Vacancy.

The plain language of the Charter provisions leads us to conclude that the Charter distinguishes between the “term” of the office, which is generally a four year period, and the personal “term” of the office-holder, which can be less than the term of the office. This distinction is evident in Charter section 12 (e) which provides that, although the regular term of a Council District office is four years, the term of the office-holder lasts *until a successor is elected*, which could occur prior to the expiration of four years. This distinction is confirmed by the language of the term limitation provisions of the Charter (Section 12 (f)) which discusses the “partial term” of an office-holder, which could be less than the normal four year “full term.”

With this distinction in mind, we conclude from the history and plain language of the Charter provisions that, prior to the changes made in 1994, a separate term of office was created upon a vacancy, one we refer to as a “caretaker” term. The “caretaker” term was distinct from the remnants of the regular term of office. The statutory scheme of the Charter provides that once a vacancy occurs in a Council District office, the personal term of the predecessor Council member ceases to exist, although the remnants of the (normal) four year term of office remains to be filled by an office-holder. Prior to 1994, the separate “caretaker” term then automatically came into existence, was filled either by appointment or election, and would exist only until the next regularly scheduled municipal election when a person would be elected to serve out the remnants of the regular term. Our conclusion is based on the placement of the clause “at which time a person shall be elected . . . to serve for the remainder, if any, of the unexpired term” (or its variations) after the clause calling for an election at the “next regular municipal election.” That choice in the sequence of language indicates an intent that the “term” commencing after the “regular municipal election” was for the remainder of the predecessor term, but that the “term” filled by appointment or election prior to the regular municipal election was only to fill the office until that time. Each of these “terms” was distinct from, although included within, the regular term of office.

This conclusion is logical in that the person appointed or elected immediately may not win the subsequent election to serve out the predecessor term. Because there may not be continuity in the occupancy of the office, it is appropriate to conclude that two separate successor terms were created upon a vacancy. Our conclusion is further supported by the contemporaneous construction of the Charter provisions. As discussed above, the ordinances calling for both special elections (in February and September of 1993) distinguished between the “caretaker” term and the term to “serve out the unexpired term” of the predecessor. In particular, the ordinance calling for the special election in September of 1993 referred to an election for a “two-year term.”

This reference confirms that the Council believed that a separate term, distinct from the “caretaker” term, would exist upon declaration of those election results.

In addition, the 1994 amendments to Charter section 12, by which the electorate provided that the remainder of the unexpired term of the predecessor would, depending upon the timing, be served out by an appointee or electee, further confirm our conclusion. Because the electorate is presumed to be aware of the prior state of the law, and that prior state must be considered when interpreting a change in the law, the electorate must be deemed to have recognized the separate nature of the “caretaker” term, and the multiplicity of elections that could result from its existence, in amending the Charter. In order to avoid that multiplicity of elections, the electorate made the choice that there would be no such “caretaker” until the next regular municipal election, but that either an appointee or electee would serve out the remaining term.

C. Relevant Municipal Code Provisions Confirm The Conclusion That A Separate “Caretaker” Term Was Created Upon A Vacancy.

Two Municipal Code provisions touch upon the “term” issue. “Term of Office” is defined at Municipal Code section 27.2020 in relevant part: “The term of office for officers elected at a special election pursuant to this article shall commence at the time the Council adopts the resolution declaring the results of such election.” This definition, in existence since at least June of 1989, confirms that a new “term” commences upon an election to fill a vacancy, that election being a special election.

Finally, Municipal Code section 27.2404 provides for the “Declaration of Result” for a vacancy election:

The candidate receiving the highest number of votes at a special election called by the Council to fill a vacant elective office shall be declared elected for the unexpired term of his predecessor and shall assume his office as soon as he has complied with applicable requirements of the law imposed on candidates at general elections.

This provision has existed in this form since 1968.

On its face, this provision would seem to conflict with the Charter provision regarding the “caretaker” election, since the “caretaker” electee did not serve out the remainder of the predecessor term as called for by the Municipal Code section. However, the provisions should be harmonized where possible, with the intent of the superior law (the Charter) controlling. We therefore conclude that where this Municipal Code section refers to the “special election . . . to fill a vacant elective office” it is referring not to the “caretaker” term but to the special election

consolidated with the regular municipal election to “serve out the unexpired term.” Thus interpreted, this section is consistent with the Charter and supports the conclusion stated above.

D. Other Legislative Materials Also Confirm Our Conclusion.

As you can see, numerous changes have been made to Charter section 12 over the years. This office issued many reports addressing the need for or effect of those changes when they were being considered. The only report that might provide some insight into the interplay between the term limit and vacancy provisions is City Attorney Report to the Committee on Rules, Legislation, and Intergovernmental Relations No. 93-6, dated January 28, 1994. A copy of that Report is enclosed as Attachment 5.

The Report, at page 2, makes reference to your unique situation as part of the discussion of the options available to the Council in dealing with vacancies. Several options were detailed, each of which eliminated the long-standing provision that a person appointed or elected to fill a vacancy need stand for election again at the next regularly scheduled municipal election. In relevant part, the Report states:

These [Charter] provisions [dealing with vacancies], and specifically the requirement that the victorious candidate in the special vacancy election serve only until the next regular municipal election, can result in two or even three elections being conducted within a few months of one another for the same Council seat - - all to determine who shall serve *the remainder of the unexpired term*. [Emphasis added.]

In summarizing the effect of the proposals, one of which was eventually adopted as the 1994 amendment to Charter section 12, the Report stated:

All three [proposals] eliminate the existing requirement that the candidate elected to fill a vacancy serve only until the next municipal elections [sic], providing, instead, *that the victorious candidate serve the remainder of the unexpired term*. [Emphasis added.]

This explanation (of the effect of adopting any one of the proposed changes to Charter section 12) supports our conclusion that the electorate appreciated the separate nature of the “caretaker” term and, by amending the Charter as they did, intentionally did away with that separate term.

E. You Have Served Three Partial Terms, Two Of Which Are Of Less Than Two Years.

We conclude that upon the completion of your current term of office, you will have served one full and two partial terms, the latter two being of less than two years each, for purposes of the term limitation provisions of the Charter. That circumstance allows you to seek and hold the District 8 office for the term commencing in December of 1998.

Our conclusion is based upon the plain language of the term limitation provisions of Charter section 12 (f). That provision states that no person shall hold office for more than two consecutive four year terms. The section further states that if a person holds office "*in excess of two (2) years*" that partial term shall be considered a full term for purposes of the term limitation. Your term from February, 1993, to December 6, 1993, qualifies as the separate "caretaker" term previously discussed. That term was clearly less than two years and thus does not count as a full term pursuant to Charter section 12 (f). Your term from December 6, 1993, to December 4, 1995, was also less than two years, although by only two days. Even though it was close to the mark, the plain language of Charter section 12 (f) requires us to conclude that it was not a full term for purposes of the term limitation. Finally, your term from December 6, 1995, to December of 1998 will clearly be a full term pursuant to Charter section 12 (f). Thus, we conclude that you will have only served one full term for purposes of the term limitation provision of the Charter. You are, accordingly, free to run for re-election to the District 8 office in 1998.

CONCLUSION

You are in a unique circumstance, arising because of the timing of various changes to the Charter during the course of your service in office. Based upon the plain language of the Charter, and pursuant to applicable rules of statutory construction, we conclude that you will have served two partial terms, of less than two years, and one full term, as those phrases are used in the term limitation provision of the Charter. You are thus free to run for re-election in District 8 in 1998.

CASEY GWINN, City Attorney

By

Leslie J. Girard
Assistant City Attorney